

THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

LIGTEL COMMUNICATIONS,)
)
Plaintiff,)
)
) CAUSE NO: 1:20-cv-37
v.)
)
BAICELLS TECHNOLOGIES, INC. and)
BAICELLS TECHNOLOGIES NORTH)
AMERICA, INC.,)
Defendants.)

TRANSCRIPT OF TELEPHONIC HEARING ON

PRELIMINARY INJUNCTION HELD

APRIL 15, 2020, BEFORE THE

HONORABLE HOLLY A. BRADY, UNITED STATES

DISTRICT COURT JUDGE

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1 (Whereupon, the following proceedings were held on
2 April 15, 2020, in open court, with all counsel appearing
3 via telephone:)

4 **THE COURT:** Good morning, everyone. We're on the
5 record now in LigTel Communications, Inc. versus BaiCells
6 Technologies, Inc. and BaiCells Technologies North America,
7 Inc. in case number 1:20-cv-37. This matter is scheduled
8 today for a hearing on LigTel Communications' Motion for
9 Preliminary Injunction.

10 Let the record reflect that the parties are participating
11 by telephone, and the plaintiff is represented by Attorneys
12 Gabriel Gillett, Sam Feder, Michael Schultz and Leigh Jahnig.

13 The defendants are represented by Adam Arceneaux, Eric
14 McKeown and Jessa DeGroote.

15 It's my understanding that Mr. Gillett will be speaking on
16 behalf of LigTel Communications, and that Mr. Arceneaux will
17 be speaking on behalf of the defendants, is that correct, Mr.
18 Gillett?

19 **ATTORNEY GABRIEL GILLETT:** Yes, it is, Your Honor.
20 Good morning.

21 **THE COURT:** Good morning. And Mr. Arceneaux, is that
22 correct, you'll be addressing the Court on behalf of the
23 defendants?

24 **ATTORNEY ADAM ARCENEAUX:** Yes, Your Honor.

25 **THE COURT:** Okay. First, I just wanted to let you

1 know -- and thank you for your pre-hearing submissions. The
2 Court has had the opportunity to review and study the briefs
3 that were filed in anticipation for today's hearing, and I
4 also appreciate the cooperation of counsel in agreeing to move
5 forward with this motion for a preliminary injunction through
6 a telephonic oral argument.

7 With that, I will go ahead and turn it over, then, to Mr.
8 Gillett to argue on behalf of LigTel Communications in support
9 of the motion for a preliminary injunction.

10 Mr. Gillett, please go ahead.

11 **ATTORNEY GABRIEL GILLETT:** Thank you, Your Honor. If
12 it's okay, I would like to start with the 3 high-level reasons
13 why I think the Court should grant LigTel's motion. And then
14 I would be happy to answer the Court's questions and provide
15 more detail, if it would be helpful.

16 **THE COURT:** That would be fine. Thank you.

17 **ATTORNEY GABRIEL GILLETT:** First, the key facts here
18 -- great, Your Honor.

19 The first point is that the key facts here are undisputed.
20 The HNI codes are and always have been 6 digits in the United
21 States. They're assigned by an industry group called ATIS,
22 and ATIS assigned LigTel 311980.

23 Rather than get its own 6-digit code from ATIS, BaiCells
24 chose to assign itself a 5-digit code, 31198. But BaiCells
25 has not offered any explanation for why it --

1 **THE COURT:** Mr. Gillett. Mr. Gillett, I apologize,
2 can you hang on for one moment?

3 Could you please get closer to the phone? It's a bit
4 difficult to hear you. I have the benefit of seeing realtime
5 reporting, but it would be very helpful to our Court Reporter
6 if you could get a little bit closer to the phone so she can
7 hear you more clearly?

8 **ATTORNEY GABRIEL GILLETT:** Sure. Is this better,
9 Your Honor?

10 **THE COURT:** That's better.

11 **ATTORNEY GABRIEL GILLETT:** Okay. Great.

12 So as I was saying, LigTel has a 6-digit code. BaiCells
13 chose to assign itself a 5-digit code that is 1 digit away
14 from LigTel's code.

15 However, the evidence shows that 31198 is the same as
16 311980. ATIS, the HNI administrator that controls the
17 process, BaiCells itself and customers all say that those two
18 codes are the same.

19 The evidence also shows that BaiCells used a 31198 that's
20 caused actual confusion and actually misled at least 3
21 Internet Service providers. Nevertheless, BaiCells has
22 continued using that number to LigTel's detriment, and it
23 continues to do so today.

24 The second point is that applying the Seventh Circuit's
25 sliding scale approach, LigTel has met the standard for a

1 preliminary injunction. LigTel has shown that BaiCells used a
2 31198, mixed the signal from BaiCells' equipment, appear to be
3 LigTel's -- and BaiCells' use of that code in communications
4 misleads providers into believing that 31198 is valid and
5 authorized.

6 Those actions violate 2 different aspects of the Lanham
7 Act. One is called palming off, and the other is
8 misrepresentation. And the resulting confusion has
9 irreparably harmed LigTel's goodwill and reputation.

10 The third point is that the balance of harm favors LigTel
11 and supports preliminarily enjoining BaiCells. BaiCells has
12 itself to blame for any burden that a preliminary injunction
13 would impose. And that's important, because the case law says
14 that you don't need to consider that when balancing the
15 relative harm.

16 And a preliminary injunction is warranted here, despite
17 BaiCells' efforts to migrate to its own HNI code. The
18 evidence shows that BaiCells is causing harm and confusion
19 today. That alone justifies an injunction, even if BaiCells
20 claims that it may stop using 31198 in the future.

21 And, importantly, without an injunction, LigTel is still
22 at risk because the ATIS-led migration process that BaiCells
23 relies so heavily on is voluntary, it's non-binding and it's
24 unenforceable. That is exactly why we came to court after
25 going through that process.

1 In addition, that plan is substantively inadequate,
2 because BaiCells' SIM cards will continue to use 311980, even
3 after the migration is complete.

4 And one last point, Your Honor. BaiCells said in its
5 papers that an injunction risks harm to non-parties. We
6 disagree. There is no risk to non-parties for ordering
7 BaiCells to complete the software aspect of the migration
8 immediately. They can do it remotely. It doesn't require
9 contact with customers, and it's an update that they have
10 already written and rolled out and it's already in place.

11 And, in addition, the Court can, of course, tailor any
12 injunction to avoid any risk that it sees. Therefore, those
13 are the 3 key reasons we think the Court should grant LigTel's
14 motion and enjoin BaiCells from using 31198.

15 With that, I'd be happy to answer the Court's questions.

16 **THE COURT:** Thank you, Mr. Gillett. I do have some
17 questions for you. I guess one of the questions that the
18 Court has is exactly what does LigTel contend the irreparable
19 harm is that it suffered?

20 **ATTORNEY GABRIEL GILLETT:** Your Honor, that harm is
21 damage to our goodwill and reputation, and it's manifested in
22 a couple of ways. The first is, frankly, when we found out
23 that this was happening, it was because a company called
24 Viaero contacted us and said that our signal was interfering
25 with their signal. That alone made us look like a bad actor

1 to Viaero and damaged LigTel's reputation. Of course, you
2 know, we've resolved that issue, but it doesn't fix the
3 problem.

4 And I think the second way that the harm manifests is in
5 making us look -- making LigTel look like it doesn't follow
6 the applicable rules and guidelines that apply to service
7 providers. These are the ATIS rules and some of the other
8 guidelines that, for example, require LigTel to be able to
9 know where all of its end users are, where everyone using the
10 LigTel SIM card is.

11 Because of what BaiCells is doing, LigTel can't comply
12 with those rules. And because it looks like a bad actor, it
13 makes it more difficult for LigTel to interface with other
14 providers. They do that by negotiating cross border
15 agreements. They do that with industry technical groups where
16 the different companies share information.

17 But the evidence is that if LigTel looks like a bad actor
18 because their signal is causing inference or because they
19 can't control their network or because there are all these
20 communications that look like they're coming from LigTel when
21 they're not --

22 **THE COURT:** But has LigTel actually suffered any
23 damage as a result of this isolated incident that happened
24 back in June 2019? For example, has it noticed any reduction
25 in its revenues, its customers or anything?

1 It seems to me that their irreparable harm is very
2 speculative, in that LigTel argues that its reputation has
3 been harmed, because it looks like it's interfering with other
4 providers when, in fact, it has not.

5 Has LigTel really suffered any tangible harm?

6 **ATTORNEY GABRIEL GILLETT:** A couple of points, Your
7 Honor. The first is that the nature of the harm that we're
8 suffering is, by definition, it can't be quantified. So there
9 isn't a number I can give you to say because of the damage to
10 our reputation and goodwill, we've lost "X" number of
11 customers or lost "X" number of reduction of sales. That type
12 of harm would be compensable by damages. Whereas, the harm
13 we're suffering can only be resolved through an injunction.

14 I think the second point that's important to remember is
15 that we don't need to show actual harm in order to meet the
16 standard for a preliminary injunction.

17 The Seventh Circuit has been very clear that what the
18 Court is looking for is a likelihood of harm, not that a harm
19 has already happened. We are not required to wait until a
20 customer says to us, We heard about this issue and so we're
21 leaving you before going to court.

22 And the reason that we're here and we're here now is
23 because we're proactive. We know that there's actual
24 confusion. We know that customers in the market are confused
25 about this stuff. We know that there is no dispute whatsoever

1 that BaiCells is using this code and it's our code, and we
2 think that's all we need to get a preliminary injunction.

3 So the fact that there hasn't been a tangible reduction in
4 revenues or sales or something like that, frankly, it isn't
5 relevant to the Court's analysis at the end of the day.

6 **THE COURT:** Do you agree in BaiCells' response it
7 pointed out the eBay decision as well as the Flava Works
8 decision that questions whether or not irreparable harm is
9 presumed? Do you agree that irreparable harm is not presumed
10 in this case?

11 **ATTORNEY GABRIEL GILLET:** Well, we don't, Your Honor
12 and here's why: eBay was a patent case; Flava Works was, I
13 think, a copyright case. So under Seventh Circuit law, the
14 presumption of irreparable harm in Lanham Act cases still
15 exists.

16 Now, I think more importantly, the issue is that we aren't
17 claiming that we're irreparably harmed just because we have a
18 Lanham Act claim. We're claiming irreparable harm because of
19 the type of damage that we're suffering, meaning the goodwill
20 and the reputation. And there is no dispute, even after eBay
21 and after Flava Works and the other cases, that that type of
22 harm is still irreparable, it's presumptively irreparable.
23 And frankly, that type of harm comes up in many other types of
24 cases. It's not limited to the Lanham Act.

25 But what eBay and Flava Works were dealing with was

1 whether if you have a Lanham Act claim, you need to show
2 irreparable harm, you know, you need to provide evidence of
3 it. We're not claiming we don't need to provide that
4 evidence. We think we have provided it, just as we discussed.

5 **THE COURT:** With respect to the trade secrets, it
6 seems that the briefs, the LigTel briefs kind of gloss over
7 exactly what trade secrets you contend have been
8 misappropriated. I mean, you're not contending that the HNI
9 number is a trade secret, are you?

10 **ATTORNEY GABRIEL GILLET:** That's correct.

11 **THE COURT:** So exactly what trade secrets does LigTel
12 contend have been misappropriated?

13 **ATTORNEY GABRIEL GILLET:** We think there are 3
14 types. The first is LigTel's encryption code. The second is
15 LigTel's network architecture. And the third is the network
16 engineering. And I think those last two categories, maybe the
17 Court can think about them like the blueprints for a building.

18 They are the inner workings of how our network works.
19 They are proprietary. They are confidential. They are the
20 result of much effort and fine tuning and constant tweaking to
21 make sure that the system works. And that stuff is not only
22 confidential, it's also valuable.

23 **THE COURT:** But what evidence is there that anyone
24 with BaiCells has misappropriated the network architecture or
25 the network engineering or the encryption code?

1 **ATTORNEY GABRIEL GILLET:** The evidence, Your Honor,
2 is sort of a stack of stuff. It is admittedly circumstantial,
3 but we think that it adds up to make it appear as though they
4 have this information.

5 And the way that happened is that a company called
6 Huawei -- LigTel worked with a company called Huawei to build
7 a network. LigTel gave those three type of trade secrets to
8 Huawei, subject to a non-disclosure agreement. Huawei built
9 the LigTel network, which was the first one in the United
10 States, the first LTE network.

11 After that, 2 of Huawei's employees left to found BaiCells
12 to compete with Huawei in the United States to provide
13 exactly these types of networks. And from there, there are
14 more facts that at least support the inference that BaiCells
15 has our trade secrets.

16 **THE COURT:** I mean, if you're talking about -- I
17 mean, I read the E-mail about allegedly touting the experience
18 of the former Huawei employee. I mean he simply listed LigTel
19 as of one of, I think, there were 19 different customers. All
20 he did was list them as a company with whom he had contact. I
21 don't think that that goes so far as touting his experience in
22 order to get the job. I think that over characterizes --
23 mischaracterizes and overstates what the evidence is on that.

24 And with respect to, I mean, I read the information about
25 the July 29th, 2019 meeting when a statement was allegedly

1 made. And even if I assume that the statement was made that
2 they could get into LigTel's network, there's nothing to
3 indicate that they were able to do that without receiving
4 information from LigTel.

5 I don't see -- you pointed out at the beginning of your
6 remarks that it's circumstantial evidence. And I think it's
7 pretty light circumstantial evidence at that. So is there any
8 other evidence, other than the two pieces of evidence that I
9 just discussed?

10 **ATTORNEY GABRIEL GILLETT:** I mean, I would say that
11 mostly captures it. I think the third piece of evidence that
12 the Court should consider is Mao's own statement -- Mr. Mao is
13 the person who allegedly can get into our network.

14 His declaration includes an exhibit where he describes --
15 he's talking to his BaiCell colleagues about strategy for
16 dealing with LigTel; it's an exhibit to his declaration.

17 **THE COURT:** Is that the one where he said that he dug
18 through his notes?

19 **ATTORNEY GABRIEL GILLETT:** That's right. He says
20 he's dug through his old notes --

21 **THE COURT:** Well, couldn't his old notes be something
22 as much as just names of people? I don't know that digging
23 through his notes necessarily equates to him misappropriating
24 information in violation of the parties' non-disclosure -- or
25 the Huawei and LigTel non-disclosure agreement.

1 **ATTORNEY GABRIEL GILLETT:** Your Honor, I take Your
2 Honor's point. I think the statement is more important
3 because it reflects on Mr. Mao's lack of credibility, that
4 what he's talking about in that e-mail is digging through old
5 notes, and he provides a bunch of technical information,
6 details in e-mails that seems like it would have been written
7 down. But then in his declaration, he says, "Actually when I
8 said 'old notes,' what I was talking about was my memory." To
9 me, that is just, on its face, not believable. And I think if
10 Mr. Mao is going to represent to the Court that when he wrote
11 the phrase to his colleagues "Digging through my old notes,"
12 what he really means is he was scratching his head thinking
13 about it, I think the Court has grounds to disregard
14 everything in his declaration. And I think that's not the
15 only issue that we found.

16 I think, similarly, on the HNI code issue, Mr. Jeffrey
17 Raasch, I believe is his name, submitted a declaration from
18 BaiCells, submitted a declaration saying that HNI codes are 5
19 or 6 digits. He has no support for it. He has no -- cites to
20 no authority for it; he just asserts it. But all of the
21 evidence in the record says that's patently not true.

22 The HNI administrator says HNI codes in the United States
23 are a fixed 6-digit code. BaiCells own documents, the e-mails
24 among the colleagues and a couple of reports that we saw say
25 HNI codes are 6 digits. We've looked. Every HNI code in the

1 United States is 6 digits, therefore we're going to chose a
2 5-digit code. But there's no --

3 **THE COURT:** And I'm certainly going to ask Mr.
4 Arceneaux exactly how BaiCells landed upon those 5 digits,
5 understanding -- it's my understanding that the 311 is not
6 unique; that all of the HNI codes in the U.S. start with 311.
7 So we're down to those final 3 digits.

8 But aside from that, exactly what advantage does BaiCell
9 gain by using the same HNI code? That's troubling to me. I
10 don't understand exactly what advantage they have by using
11 that. Can you shed any light on that?

12 **ATTORNEY GABRIEL GILLETT:** I can. I want to just
13 correct one little bit, Your Honor, and that is that 311 is a
14 country code for United States, but it's not the only one;
15 310, 311, 2, 3, 4, 5 and 6 are all country codes for the
16 United States, and so it's not as though -- I mean, I guess in
17 BaiCell's version of the world, they had a 1 in 99 chance of
18 picking our number. That's not even -- even to pick our
19 number out of 99 is pretty unbelievable. But it actually was
20 picking our number out of 99 times 5 or 6 maybe -- my math
21 might be off. And that even assumes they're going with 6
22 digits.

23 But beyond that, I think the reason -- you know, I think
24 it's up to BaiCells to explain why they would have taken our
25 code. I think that we're a solid company. We've been in the

1 market for a long time, we're family owned, and I don't know
2 exactly why they would have taken our code, except our
3 reputation is stellar and we built the first LTE network in
4 the United States and so I think our experience probably is
5 valuable. I think that to use our code, you know, brings an
6 air of goodwill. We have a strong reputation --

7 **THE COURT:** Goodwill with whom?

8 **ATTORNEY GABRIEL GILLETT:** -- reputation in the
9 industry and we are really leaders in this technology. I
10 think with other providers, with the rest of the market.

11 **THE COURT:** With the other providers, not necessarily
12 with the end user; not with the consumer?

13 I mean, explain this to me, Mr. Gillett, so if other
14 providers are out shopping with your competitors, who exactly
15 looks at it and says oh, they're 311980, that's a great
16 company? I mean, I don't understand where the discussion of
17 the 311980 or the HNI code would ever even come into any
18 discussion when you're selecting a provider.

19 **ATTORNEY GABRIEL GILLETT:** I don't disagree, Your
20 Honor. I think that for purposes of the Lanham Act, though,
21 the end user is not relevant here. I think that the Lanham
22 Act makes it an issue to palm off a product or service. It
23 makes it an issue to misrepresent a product or service. It
24 doesn't have to be misrepresented to the customer. And what
25 the evidence is the end user customer.

1 What the evidence shows is that Internet service providers
2 are customers in the context of this case. That's who
3 BaiCells sells its equipment and services to. Those are the
4 companies that we are competing with. Those are the companies
5 that are misled and they do look at the HNI code. That's why
6 the Viaero incident happened, precisely because Viaero's
7 signal was being interfered with. The signal that was
8 interfering had the LigTel HNI code affiliated with it, and so
9 they called us and they said, "Stop messing with our signal."

10 This isn't the situation like, I grant you, many other
11 Lanham Act cases where you have retail-level confusion and the
12 issue is it's a retail-level customer going to be confused.
13 That's just not relevant here, because you're right, and you
14 know, we grant that the retail-level customer is not choosing
15 based on HNI codes.

16 But the provider level of the market does look at HNI
17 codes. They rely on them --

18 **THE COURT:** They rely upon them in determining if
19 there's interference, is that fair?

20 **ATTORNEY GABRIEL GILLET:** That's fair, and also in
21 determining whether another provider is complying with the
22 applicable rules.

23 So if you were going to talk about doing -- if you were
24 working on a cross-border agreement with another company, it
25 would certainly be part of the negotiating and evaluation to

1 figure out do I have a good actor on the other side or do I
2 have a bad actor.

3 When LigTel comes to other companies and says we're having
4 trouble with this aspect of our network, if you had experience
5 with this, you know, can you share some information? If other
6 providers think we're bad actors, that we don't follow the
7 rules, they're not going to help us. The reality is --

8 **THE COURT:** And I apologize, I can't remember the
9 exact name, but the June 2019 entity, Viaero, I believe it
10 was, so if they went out and started telling Internet service
11 providers that LigTel was interfering, then LigTel could
12 experience some harm in the industry, is that what you're
13 saying?

14 **ATTORNEY GABRIEL GILLET:** I think the fact that
15 Viaero thinks that we're interfering is harm enough. But yes,
16 if they go out and tell others, that amplifies the harm. And
17 I think the other evidence in the record relates to a company
18 called Sandhills. Sandhills thought the 31198 was an
19 authorized code and, in fact, it was not. They didn't realize
20 it was our code, and that they had no authority to use it.

21 The same thing with a company called New Lisbon that's in
22 Indiana. When we approached them and said, "Are you using
23 31198, that's our code," the evidence is that they said, "Oh,
24 we didn't realize that was your code. We thought it was
25 BaiCells. We didn't realize we were using it without

1 authorization."

2 So it's not as though this is one incident. I think the
3 issue is that one incident is what sparked us to do an
4 investigation and figure out that this was an issue that
5 BaiCells is creating all around the country.

6 **THE COURT:** In BaiCells' brief they argue that
7 consumer confusion is required. Do you agree that consumer
8 confusion is required? Well, I guess, first, has there been
9 any actual consumer confusion?

10 **ATTORNEY GABRIEL GILLETT:** The answer is yes and yes,
11 Your Honor. Consumer confusion is required, and we have
12 actual evidence of actual consumer confusion.

13 BaiCells doesn't acknowledge in their brief -- and I think
14 we deal with this pretty well in our response, at least I hope
15 you thought it was pretty well -- that consumer confusion, for
16 purposes of the Lanham Act, does not mean end-user confusion.

17 So as we discussed, it is not as though we don't meet the
18 Lanham Act elements just because retail customers are not
19 confused in this case. There are plenty of Seventh Circuit
20 cases and cases from elsewhere where the issue is not end-user
21 confusion, but rather confusion at the relevant level of the
22 market. And that's what the Court looks to.

23 It doesn't necessarily -- you know, if BaiCells is making
24 equipment and selling it to providers, you look to the
25 provider confusion. BaiCells doesn't sell to end users

1 either, so the end users are not likely to be confused by what
2 BaiCells does. But that doesn't immunize BaiCells from
3 violating the Lanham Act just because it doesn't sell to end
4 users.

5 And I think on the actual confusion point, Viaero and
6 Sandhills and New Lisbon are all examples of actual confusion
7 in the record. The undisputed evidence, which BaiCells does
8 not address anywhere, even after seeing it in our opening
9 brief, those 3 companies at least say, "We didn't realize that
10 31198 was not BaiCells' code, and it is your code and that we
11 didn't have authorization to use it."

12 That's why, I believe it's Sandhills, enters into a
13 license with us to use that code, because they were afraid
14 that they were violating the rules, as they were.

15 Same thing with New Lisbon. We didn't end up with a
16 license, but in the conversation with them, they were
17 similarly confused. They thought that BaiCells had the
18 authority to use that code, and they do not.

19 And from the part of Viaero, there is a quote from the
20 Viaero executive that we spoke with, and he says, "BaiCells
21 should not be telling clients to use your information.
22 Sandhills should shut down until they have their own code."
23 That's precisely because Viaero was confused.

24 **THE COURT:** With respect to the Mitigation Plan that
25 LigTel -- I'm sorry -- I apologize -- that BaiCell submitted,

1 what about the Mitigation Plan is objectionable from LigTel's
2 perspective?

3 **ATTORNEY GABRIEL GILLET:** I think there are a couple
4 of points. The first is that it is voluntary and
5 unenforceable. And so, from our perspective, given that
6 BaiCells has been using our code for a long time, continued to
7 do it and still has no explanation for its activity, we don't
8 trust that they're going to follow through on it to begin
9 with.

10 But I think, even assuming they do, we have 2 additional
11 issues. The first is that they propose to not be done until
12 July, which we think they should be required to be done much
13 sooner, especially given the fact that we told them about this
14 issue, I think now, 9 months ago.

15 The second issue -- and I guess on that front, there are 2
16 parts of the upgrade. The first is 2 parts of the migration.
17 The first part is a software upgrade, and that's all that
18 they've done so far; I think it's about 20 percent of their
19 customers, maybe it's 25. They pushed out this software
20 upgrade that stops the signal coming from BaiCells' equipment
21 from looking like it's coming from LigTel.

22 But there's no reason -- we think their plan is
23 inadequate, because it waits until July to fix the other 75
24 percent of the customers.

25 The second component is a physical one, and that has to do

1 with SIM cards, which are the chips, little microchips in all
2 of the devices. And those SIM cards actually say on them
3 "311980." They have our code. They're identified as LigTel's
4 SIM card, and BaiCells' Migration Plan does not commit to
5 changing SIM cards for existing users. We think that's a huge
6 problem with it, because until those SIM cards are swapped
7 out, they're still not complying with the ATIS rules, and
8 there's still a possibility -- there's still a real risk of
9 confusion, both on the part of providers and on the part of
10 the law enforcement.

11 **THE COURT:** And I'll ask Mr. Arceneaux about the SIM
12 cards, but I know in one of the exhibits that was submitted to
13 the Court, the status update indicates that at least new SIM
14 cards were being shipped out to operators beginning in
15 February of 2020. So we'll hear from BaiCell about the new
16 SIM cards.

17 But with respect to the timing, what harm is LigTel going
18 to suffer between now and July 1st? Is there any new harm
19 other than what you've already told me about?

20 **ATTORNEY GABRIEL GILLET:** Got it. On the SIM card
21 issue, Your Honor, I would point out I think what they're
22 doing, at best, is changing SIM cards for new customers, but
23 it's a little bit unclear in the record whether they have
24 60,000 or some smaller number of existing SIM cards in the
25 world.

1 And the way we read the Migration Plan, the way we've read
2 counsel's representations about it, we don't think that
3 they're planning to swap out those possibly 60,000 cards.

4 As for the harm, there is not some additional harm, some
5 new aspect of harm that we think will happen between now and
6 July. But we're being harmed today. They are using our code
7 with no basis for doing so and, frankly, without any
8 identified defense for doing so today.

9 And so, frankly, every day that goes on when we have this
10 overhanging risk based on the actual confusion, we think, is a
11 bad day. And we also think the fact that, you know, we're not
12 asking the Court to order them to develop some new software
13 and deploy it to make sure, you know, when there could be bugs
14 in it to cut people off the Internet.

15 This software has already been written, it's already been
16 tested, it's already been deployed. The only issue is that
17 right now BaiCells has encouraged its customers to update the
18 software. They are not requiring it. And I think there's no
19 reason that the Court can't issue an injunction that requires
20 them to do the software update essentially immediately,
21 because it's already ready to go, and that would resolve a
22 huge risk of harm, because it would fix the signal issue. It
23 would stop the palming off problem that we've identified.

24 **THE COURT:** So in terms of the injunctive relief that
25 you're seeking, you filed a motion for a preliminary

1 injunction. Are you seeking to then maintain the status quo,
2 or are you seeking something more than that? There you just
3 mentioned that you require them to go ahead and implement this
4 new update immediately rather than waiting until January (sic)
5 1st.

6 Exactly what does the injunction that LigTel is seeking
7 look like?

8 **ATTORNEY GABRIEL GILLETT:** It would be more than the
9 status quo. The injunction we seek would require BaiCells to
10 upgrade the software immediately. It would require LigTel --
11 require BaiCells, excuse me, to replace the SIM cards for
12 existing users, I think, as soon as practicable. Because of
13 the physical component of that, you know, we recognize that we
14 don't advocate that the Court require BaiCells to go out and
15 make physical contact with people under the circumstances we
16 find ourselves in.

17 And then I think the other components of an injunction
18 would require that BaiCells not use our number in any fashion
19 anymore.

20 And as the Court might recall, even when we got to court
21 the first time, BaiCells was still using our code in its
22 communications on its website. It was only when the Court
23 intervened, that BaiCells finally agreed to take our code off
24 of the website. And I think that, you know, in terms of
25 whether the Court feels like the injunction would just

1 implement the status quo, I think the injunction can require
2 BaiCells to cease using the code immediately, but give them a
3 little bit of time to come into compliance with that. I think
4 they don't need to go until July, but I am conscious of the
5 fact that, you know, if the Court issues an injunction at noon
6 today, BaiCells needs a little bit of time to get the update
7 out there into the world.

8 **THE COURT:** What period of time do you think is
9 reasonable to allow them to get the update?

10 **ATTORNEY GABRIEL GILLETT:** Sure. You know, I don't
11 have a good answer, Your Honor, because I think it depends on
12 -- that's something that BaiCells would probably need to give
13 us more evidence about. I think it could be done quickly.

14 **THE COURT:** Well, but haven't they already told you
15 the evidence is July 1st at this point? I mean, what evidence
16 does LigTel have that July 1st is not reasonable?

17 **ATTORNEY GABRIEL GILLETT:** Your Honor, they have not
18 said that they need until July 1st. They just decided to do
19 it July 1st. And so right now, they are encouraging their
20 customers to do the update, but there's no reason they can't
21 require the customers do the update.

22 My understanding from talking with Mr. Wentworth, who is
23 sort of the counterpart at LigTel that deals with these
24 things, is that there's no reason the software can't be
25 updated immediately. So I think in terms of what's

1 reasonable, I don't think know need much time, within a week
2 probably to get this thing out.

3 I do think that BaiCells would need to contact its
4 customers and explain that, you know, previously they were
5 hoping to do the update by the end of July, but they're
6 speeding up the process. But, you know, I think any sort of
7 burden from that they've brought on themselves, so it's not a
8 reason to not issue an injunction.

9 The sort of voluntary cessation of illegal action isn't a
10 reason to not require them to stop doing the illegal action.

11 **THE COURT:** And I apologize, because I don't recall
12 the name of the administrative agency to which BaiCells
13 submitted its Mitigation Plan, but the BaiCells Mitigation
14 Plan, as I understood it, has been approved by that agency,
15 correct?

16 **ATTORNEY GABRIEL GILLETT:** That's right. That agency
17 is what I've been referring to as ATIS, A-T-I-S.

18 **THE COURT:** Thank you.

19 **ATTORNEY GABRIEL GILLETT:** And ATIS has approved the
20 Mitigation Plan. But ATIS is a voluntary industry group. And
21 so nothing that ATIS does is binding or enforceable. That's
22 what we need the Court for. And that's frankly why we're
23 here, that we learned of the problem. We talked to BaiCells
24 about it. BaiCells had no explanation for what it was doing
25 and said it would not stop. So then we went to ATIS.

1 BaiCells resisted the ATIS process and eventually came up
2 with a Migration Plan that we think is inadequate, as we've
3 discussed. But even then, you know, we felt like we needed to
4 come to court to get an injunction to make sure this happens,
5 and make sure that the migration is both -- it happens quickly
6 and it happens completely. Because we don't trust, based on
7 our activity (phonetic) with BaiCells and based on the
8 evidence in the record.

9 That just them saying, "We'll migrate the code in July"
10 gives us no comfort. We know when there's confusion and
11 there's confusion today. We know that we're being harmed
12 today, so we think we need an injunction today.

13 **THE COURT:** Okay. Thank you, Mr. Gillett. I may
14 have some follow-up questions from you after I hear from Mr.
15 Arceneaux.

16 Mr. Arceneaux, you want to go ahead with your argument,
17 and please feel free to address any of the issues that have
18 been posed to Mr. Gillett during his initial argument.

19 Please go ahead.

20 **ATTORNEY ADAM ARCENEUX:** Certainly. Thank you, Your
21 Honor, and I do intend to cover all of them.

22 I'd like to go back to the incident which brought us all
23 here today, and that was in June of 2019 when Viaero Wireless
24 out in Colorado was experiencing some radio frequency
25 interference with another network provider in Nebraska,

1 Sandhills Wireless.

2 I think it's important to know that the interference
3 itself was not caused by any HNI or PLMN code used by anybody.
4 The interference itself was not caused by BaiCells' equipment.
5 The interference was caused by the fact that the two carriers
6 were using the same radio frequency, 3.65 or 3.70 megahertz,
7 to be precise.

8 So when that happened, we understand from the record that
9 Jeff Brown, Viaero, contacted Josh Wentworth at LigTel on June
10 21st. And I would refer the Court to Exhibit 10 of Mr.
11 Wentworth's declaration, and that can be found at docket
12 number 36-46. It's a June 26, 2019 e-mail that Mr. Brown sent
13 to Mr. Wentworth when this issue arose.

14 And that e-mail contains two things of note. It contains
15 a screen shot of Viaero's modem that they used to identify --
16 Sandhills is another network operator. And on that screen
17 shot, it says "PLMN 31198." So what Viaero saw was not the
18 311980 number. What Sandhills was broadcasting was a 31198.

19 Now, the second part of that e-mail contains a link to
20 BaiCell's website as it existed as of June 26th where the
21 website admittedly contained many references to the number
22 that BaiCells had been using, which is 31198.

23 So that's the information that Viaero had and communicated
24 to LigTel when this issue arose. Now BaiCells first learned
25 about this radio frequency incident on July 2nd, 2019 when Sam

1 Tetherow of Sandhills submitted a ticket on BaiCells' port
2 (phonetic) website.

3 Rick Harnish who, Your Honor, was listening in on the
4 hearing today, and then he was a director of wireless internet
5 service provider markets, and I had a phone conference with
6 Mr. Tetherow on July 9th. And Mr. Tetherow believed that the
7 interference issue on that band, reported that Viaero had
8 contacted LigTel and reported that Sandhills had temporarily
9 resolved the issue with LigTel.

10 Same day, Mr. Harnish had a conversation with Steve Barnes
11 of New Lisbon phone company. And Mr. Barnes reported that
12 Randy Mead, LigTel's showroom (phonetic) manager had contacted
13 New Lisbon to ask about --

14 **THE COURT:** Mr. Arceneaux, I hate to interrupt you,
15 but could you speak up just a little bit? I'm having a little
16 bit of trouble hearing you.

17 **ATTORNEY ADAM ARCENEUX:** Yes, Your Honor. Is that
18 clearer?

19 **THE COURT:** That's better I think.

20 **ATTORNEY ADAM ARCENEUX:** Okay. I'll try to make
21 sure that you and the Court Reporter can hear clearly.

22 **THE COURT:** Thank you.

23 **ATTORNEY ADAM ARCENEUX:** So when Mr. Harnish learned
24 of this issue, they had a conversation with LigTel on July 12
25 with Mr. Wentworth and agreed to meet on July 29th, which they

1 did.

2 Now, at that meeting, LigTel made 2 alternative demands to
3 BaiCells. Either number 1, migrate to a new HNI code, or
4 number 2, pay LigTel a million dollars so LigTel can migrate
5 to a new code. Well, BaiCells decided we're going to migrate
6 to a new code, and that's what they've been doing.

7 BaiCells has implemented a 5-phase Migration Plan. And
8 this plan is described in detail in Mr. Harnish's 2
9 declarations, which can be found on the record 37-2 and 35-3.
10 It's a 5 phase.

11 First phase, obtaining a new HNI code.

12 Second phase, develop new software to integrate on a new
13 cloud core EPC to utilize the new code. Let me pause there.

14 BaiCells provides equipment, bay stations. They also
15 provide a cloud environment. Cloud core EPC stands for
16 evolved packet core. And what that does, it allows network
17 operators to move certain hardware functions to a cloud-based
18 computing platform.

19 Now, the cloud core only broadcasts one HNI. So that's
20 why as part of this Migration Plan, we had to develop, in
21 addition to developing new software, a new cloud core to
22 broadcast the new HNI.

23 Phase 3, scenarios testing and migration preparation.

24 Phase 4, network validation.

25 And phase 5, announcement and migration of the operator

1 networks to the new software and the new cloud core EPC.

2 As Your Honor noted, this has all been done under the
3 auspices of ATIS, more specifically the NC Oversight Counsel
4 or the IOC, which is the division of ATIS responsible for the
5 management of these codes in the United States.

6 So BaiCells began its work with the IOC or ATIS on July
7 22nd, before it even met with LigTel, when it submitted an
8 application for its HNI.

9 On September 12th, BaiCells submitted its appeal of the
10 Migration Plan to the IOC. The IOC met on September 20,
11 reviewed and agreed upon the plan.

12 On November 6, there was another IOC meeting where the IOC
13 reviewed an ATIS summary of the plan, and BaiCells agreed to
14 provide periodic updates on progress. And BaiCells submitted
15 progress reports December 20, February 20, March 18 and just
16 this morning, as a matter of fact. The IOC has never proposed
17 any change to the plan or based on the updates and has
18 approved the plan.

19 So let's talk about what's been accomplished. Phase 1,
20 BaiCells obtained its new HNI code on July 29, 2019.

21 On August 7, BaiCells began developing its new software
22 and the new cloud core EPC environment.

23 In September, it began testing the new HNI code and
24 confirmed by the end of September preliminary testing of that
25 new code.

1 In October of '19 BaiCells recruited customers for trial
2 testing of the new software and to identify and resolve any
3 bugs. As I'm sure the Court is aware, anytime you develop
4 software, there are always bugs. And so it's a process to
5 find solutions to those and to develop new versions of the
6 software until it works properly.

7 In October of 2019, BaiCells ceased shipping the old SIM
8 cards. And from that point forward, only ships SIM cards
9 containing the new HNI code. And I'm going to talk about SIM
10 cards in a little bit here.

11 November of 2019, BaiCells began rewriting numerous
12 guides, training materials, data sheets, continued running its
13 test scenarios, monitoring data logs, identifying corrected
14 bugs and software.

15 In December, BaiCells listed additional customers to
16 conduct trials of the new software and cloud core. And on
17 December 10th, made its first announcement of new software
18 upgrades for certain equipment to facilitate the change and
19 continued testing.

20 In January of 2020, BaiCells began work to replace all
21 documents on its website to reflect the new HNI, and that work
22 was completed after our first call with the Court before
23 February 19, 2020, which was about a week after that call.

24 On July 29, 2020, BaiCells announced the release of new
25 software; this is all changed to the new code.

1 February 28th, announced a new firmware upgrade to correct
2 bugs from the previous version. And with the release of that
3 version, once they were satisfied that the bugs had been
4 worked out, began its aggressive campaign for network
5 operators to upgrade.

6 Now, on March 18th, they laid down the gauntlet. They
7 were no longer encouraging. The announcement was instructing
8 network operators to upgrade all of their bay stations and to
9 view cloud core and telling them, "We are retiring the Legacy
10 Cloud Core on July 1st. If you don't upgrade between now and
11 then, you risk going off line." So it really isn't an option
12 for any network operator that uses BaiCells' equipment.

13 **THE COURT:** I'm sorry, Mr. Arceneaux. Mr. Arceneaux.
14 Mr. Arceneaux.

15 **ATTORNEY ADAM ARCENEUX:** Yes.

16 **THE COURT:** Real quick. With respect to the upgrade,
17 so that's not the end user that's conducting the upgrade; is
18 the service provider the one that's conducting the upgrade,
19 and then it automatically is pushed to the end user or are
20 these 60,000 consumers going to have to do something with
21 respect to the upgrade?

22 **ATTORNEY ADAM ARCENEUX:** No, Your Honor. The
23 upgrade we're talking about, there are currently 544 network
24 operators, and those are the people that we're talking about
25 upgrading to the new software and the new cloud core.

1 Now that upgrade does require the operators to have a bit
2 of down time, so there is some momentary network interruption
3 to the end users. But with the exception of that, the end
4 users don't have to do anything. It's the 544 network
5 operators.

6 So as we sit here today, phases 1, 2, 3 and 4 are complete
7 and we're in the final stage of phase 5. Of the 544 network
8 operators, on April 7th we submitted to the Court that 26
9 percent of them had converted and are currently broadcasting
10 the new HNI code 314-030.

11 I learned this morning, Your Honor, that number is now at
12 35 percent. And so BaiCells is on track to convert all 544
13 network operators by the July 1st, 2020 deadline that's been
14 approved by ATIS, and it's been communicated to the network
15 operators.

16 **THE COURT:** With respect -- with respect to those 35
17 -- with respect to those 35 percent -- so --

18 **ATTORNEY ADAM ARCENEUX:** Yes.

19 **THE COURT:** -- the 35 percent that have now completed
20 the upgrade, are those consumers no longer emitting the 31198
21 number?

22 **ATTORNEY ADAM ARCENEUX:** That is correct, Your
23 Honor. They are only emitting the new HNI code 314030.

24 **THE COURT:** So do they --

25 **ATTORNEY ADAM ARCENEUX:** After July 1, that will be

1 100 percent.

2 **THE COURT:** Do they have to switch out those SIM
3 cards?

4 **ATTORNEY ADAM ARCENEUX:** No, Your Honor, they don't.
5 And the reason they don't is the SIM cards do not broadcast
6 the HNI code. The SIM cards contain encrypted data and cannot
7 and will not connect to a network unless the encrypted data
8 connect.

9 And I would refer the Court to Jesse Raasch's declaration,
10 which can be found in the record at 37-3, April 9th, where Mr.
11 Raasch goes to great lengths to explain the technical reasons.
12 But let me just summarize.

13 Each SIM card contains a customer encryption code or a K
14 value, an operator encryption value code or an OP or OPC
15 value. And when a customer device -- in this case, we're
16 talking about typically home computers in rural areas.
17 They're connecting to the providers for wireless fixed
18 Internet broadband. The SIM card is located in a receiver
19 that is literally mounted to the side of the house. And when
20 somebody logs onto their computer and tries to access their
21 network provider, in order to do so, it's not just the HNI
22 code, it is the K value and the OP value, which have nothing
23 to do with the HNI code, that have to match and be
24 authenticated by the network operator's cloud core system to
25 be accepted into the network.

1 And so there's absolutely no threat posed by the SIM
2 cards. There's absolutely no reason to change those out.

3 What Mr. Gillett referred to is if you open up the box
4 mounted to the side of the house, and you remove the SIM card,
5 which no consumer would ever have any reason to do.

6 Yes, there is a lengthy IMSI code printed on the outside
7 of it that begins with the numbers 31198, followed by a series
8 of zeros and other numbers. Nobody looks at those numbers for
9 any reason whatsoever.

10 The only thing that matters for purposes of connecting to
11 the network are the embedded K value, the embedded OPC value,
12 in addition to whatever IMSI number is embedded.

13 So that's maybe more than you want to hear on SIM cards,
14 but I would refer the Court to Mr. Raasch, who gives an
15 excellent technical explanation of encryption and what's on
16 those SIM cards.

17 **THE COURT:** And Mr. Arceneaux, I just --

18 **ATTORNEY ADAM ARCENEUX:** Yes.

19 **THE COURT:** -- one of the questions that I have for
20 BaiCells is with respect to the balance of the harms. Can you
21 walk the Court through the impact of immediately terminating
22 BaiCells' use of that number? If the Court was to issue an
23 injunction that required BaiCells to stop using the HNI code
24 by, say, close of business on Friday, what impact does that
25 have on the end consumer?

1 **ATTORNEY ADAM ARCENEUX:** Yes, Your Honor. The 544
2 network operators that use BaiCells' equipment serve 26,248
3 end users.

4 Now, the market that BaiCells serves and its network
5 operator serves, rural Americans. And in many of these
6 markets, the network operators are the only (Indiscernible)
7 source of Internet access. It's not like in urban areas where
8 you have the choice of 3 or 4 providers. They're it.

9 So if the Court were to order today, you know, you're cut
10 off, we would have to immediately shut down the old cloud core
11 that uses the Legacy number. And for the, I guess as we sit
12 here this morning, 65 percent of those 544 network operators
13 who have not yet completed their upgrade, worked out all the
14 bugs and everything that's necessary to do that, their
15 customers -- and we're talking about tens of thousands of
16 individuals, because each end user, each box mounted to the
17 side of the house or mounted to the side of the business
18 serves multiple family members or multiple business owners and
19 their employees. So we're talking about ten's of thousands of
20 people who would immediately lose access to the Internet, and
21 it couldn't come at a worse time.

22 We're in the middle of a pandemic where the ability to
23 work from home, the ability for students to get their school
24 work done, many cases the ability to communicate with medical
25 providers, telemedicine would be cut off. And so that's the

1 balance of the harms.

2 First is between now and July 1st, the harm to LigTel, I
3 would submit, is nil.

4 **THE COURT:** Is it possible for BaiCells to expedite
5 this conversion?

6 **ATTORNEY ADAM ARCENEUX:** Well, I don't want to say
7 it's impossible. But I will tell you this: There's a reason
8 that July 1st was picked. The ultimatum announcement went out
9 March 18th. That's the do or die convert or you're cut off
10 July 1st. And so the expectation has been set among the 544
11 network operators that they have that time frame to do this
12 work.

13 They're doing this work during a pandemic, during a time
14 where there's peak demand to add subscribers and to add
15 Internet service. And so, you know, it's not a great time.
16 And it's not like just flipping a switch.

17 For a network operator to migrate, upgrade the software
18 and migrate from one cloud environment to another requires a
19 bit of work, it requires a bit of testing, it requires
20 resolution of any bugs or issues which arise, and that
21 requires BaiCells to provide the support necessary for that to
22 happen: Network operator by network operator.

23 There's not a master switch at BaiCells' headquarters that
24 we can flip and this is all done. It is a one-on-one working
25 with each operator to make this happen. And that's what we're

1 doing. We're at 35 percent and we're confident by July 1
2 we'll have 100 percent. Because if we don't, they're cut off
3 and they're not going to risk that. They're going to make it
4 happen. So to answer your question, we do need the time. We
5 do need the time to July 1st.

6 **THE COURT:** So with respect to LigTel's concern that
7 this is non-binding and BaiCells isn't going to complete it by
8 July 1, is it, in fact, going to occur by July 1? Are the
9 people that have not converted, are they going to be cut off?

10 **ATTORNEY ADAM ARCENEUX:** Yes, Your Honor, that is
11 what BaiCells has communicated in writing repeatedly to its
12 network operators. That is what BaiCells has communicated in
13 its Migration Plan and ATIS has approved. That is what
14 BaiCells has committed to doing.

15 This isn't some flippant exercise that BaiCells is going
16 through for the fun of it. This is a response to an issue
17 that LigTel raised. It is one of the two choices that LigTel
18 gave BaiCells is the road that we've chosen to put out and so
19 yes, it is going to happen.

20 **THE COURT:** So why did BaiCells pick 31198?

21 **ATTORNEY ADAM ARCENEUX:** Here's what I know about
22 that and what the evidence shows about that: In 2015 when
23 BaiCells' engineers in China were developing the equipment in
24 the cloud core, they had to choose a number.

25 Now, LigTel is correct. In the United States, HNI codes

1 are 6 digits. We don't argue with that. In other parts of
2 the world, however, they are 5 digits. So for whatever
3 reason -- and I don't have a good reason of why this
4 particular number was chosen. I can tell you that the first 3
5 digits match the U.S. Code. It's my understanding the last
6 two digits, the 98 were randomly chosen.

7 Now, when BaiCells then rolled out its equipment, began
8 testing in the United States, began implementing it, it simply
9 continued to use the code that had been chosen in the research
10 and development. And that is the best I can tell you.

11 I can tell you there was no nefarious scheme. There was
12 no plot to ride on LigTel's coat tails. But that's what the
13 evidence shows.

14 **THE COURT:** Okay. And I apologize. I know I kind of
15 interrupted your argument with some of my questions, but they
16 seemed timely, at least they did to me.

17 So you can continue.

18 **ATTORNEY ADAM ARCENEUX:** No, please, interrupt at
19 any time.

20 I'd like to talk about the irreparable harm, because there
21 is a big difference between the briefs of the parties.

22 LigTel cannot rely on a presumption of irreparable harm.
23 It has to present evidence that irreparable injury is likely.
24 The Supreme Court has said so in two cases. First, Winter
25 versus Natural Resources Defense Council, 555 U.S. 7, 2008

1 decision, made it clear that you have to show likelihood of
2 irreparable harm.

3 But the eBay case, which Your Honor brought up, is really
4 key here. In the eBay case, MercExchange sued eBay for
5 infringement of a business method patent. The jury found,
6 number 1, patent's valid; number 2, eBay infringed. The
7 District Court denied the preliminary injunction. The Federal
8 Court of Appeals reversed applying its general rule that
9 Courts will issue preliminary injunction against patent
10 infringement. The Supreme Court granted certiorari vacating
11 and remanded (phonetic) and cited the 4 part test for
12 injunctive relief, the same test that's facing us here today:
13 Irreparable injury, inadequate remedies of law, balancing the
14 hardships, public interest.

15 And what the Court said in eBay is: "As in our decision
16 today, this Court has consistently rejected invitations to
17 replace traditional equitable considerations with a rule that
18 an injunction automatically follows a determination that
19 copyright has been infringed."

20 And the Seventh Circuit in Flava Works versus Gunter
21 relied on eBay and says that eBay governs a motion for
22 preliminary injunction, as well as a permanent injunction, so
23 it applies in both cases and that eBay governs a copyright
24 case as well as a patent case.

25 Now this Court, the Northern District, in Furrier Property

1 Holding versus Way Interglobal, 2019 Westlaw 5587147, what
2 Judge Simon said was interesting in that case. He denied a
3 motion for preliminary injunction; it was a patent case. But
4 he cited eBay and said, "And while at times federal courts
5 have been a little squishy in applying this otherwise
6 straightforward test -- some have presumed irreparable harm in
7 certain types of cases, others have allowed a sufficiently
8 strong showing of one element obviate the need to show
9 others -- the Supreme Court has made clear that all four
10 elements must be shown and that irreparable harm cannot be
11 presumed." And Judge Simon cites Flava Works for the
12 proposition --

13 (Whereupon, Mr. Arceneaux is not speaking.)

14 **THE COURT:** Hello.

15 **ATTORNEY GABRIEL GILLETT:** This is Mr. Gillett. I
16 take it the Court has lost -- doesn't hear Mr. Arceneaux
17 anymore?

18 **THE COURT:** I do not hear Mr. Arceneaux. Mr.
19 Arceneaux, are you there?

20 **ATTORNEY GABRIEL GILLETT:** No.

21 **THE COURT:** Is anybody for BaiCells still on the
22 line?

23 **ATTORNEY ERIC McKEOWN:** Your Honor, this is Mr.
24 McKeown. I'm actually pinging Mr. Arceneaux now via e-mail
25 and trying to determine what happened to his audio.

1 **THE COURT:** Okay.

2 **ATTORNEY ERIC McKEOWN:** I will note that I actually
3 fell off the line at one point earlier in the call and had to
4 dial back in. So maybe he has experienced a similar problem.

5 **THE COURT:** Okay. Hopefully he realizes that --
6 either he thinks we're all incredibly riveted by his comments
7 at this point, or he realizes that he's dropped.

8 **ATTORNEY ADAM ARCENEUX:** Your Honor, this is Adam
9 Arceneaux. I apologize. I'm not sure what happened.

10 **THE COURT:** That's no problem, Mr. Arceneaux. I know
11 that I have been on a number of calls. I haven't had it occur
12 in hearings, but I know we've had some weekly calls that have
13 had up to 20 participants, and some of the participants have
14 noted during our calls that some of them have just been
15 dropped.

16 The point that you dropped is when you were discussing
17 Judge Simon's decision and his comments about eBay. So if you
18 want -- if you would like to pick up from that point.

19 **ATTORNEY ADAM ARCENEUX:** Okay. I will. Judge Simon
20 cites Flava Works for the proposition that eBay applies in all
21 cases, not just utility patent cases.

22 And another court in the Seventh Circuit Illinois Tamale
23 versus El-Greg, 2019 Westlaw 439-5139 expressly held that eBay
24 applies to requests for injunctions in Lanham Act cases.

25 Now, I take the time to walk through that case law,

1 because it's an important distinction. And I believe LigTel
2 is relying on a presumption to get by the irreparable harm
3 element. And we believe the case law is clear that there has
4 to be some evidence they will likely suffer irreparable harm.

5 So let's talk about what the alleged irreparable harm
6 would be. I believe that today they talk about 2 of them, but
7 since they raise 5 in their briefs, let's go through it.

8 The first thing they mention is it makes networks of
9 BaiCells' customers appear as LigTel's network. Okay. That's
10 the issue that we had out in Colorado and Nebraska. And as we
11 pointed out before, the carrier, Viaero, sent the email with
12 the screen shot showing, and the BaiCells website link showing
13 that BaiCells was the one associated with that 5-digit number.
14 They've had contact with 3 carriers: Viaero, Sandhills
15 Wireless and New Lisbon.

16 Sandhills Wireless, according to Mr. Wentworth's
17 declaration, paragraphs 24 and 25, can be found on the docket
18 at 36-36 was "concerned and willing to cooperate," and had
19 "positive discussions with Wentworth."

20 Wentworth contacted another Indiana carrier, New Lisbon,
21 so did Randy Mead, and confirmed -- New Lisbon confirmed that
22 BaiCells had directed it to use the HNI code. And then they
23 say, "We ultimately chose not to send New Lisbon a cease and
24 desist letter, because we were trying to work in good faith
25 with a fellow Indiana company."

1 There's no evidence, Your Honor, that Viaero, Sandhills or
2 New Lisbon thought any less of LigTel as a result of those
3 communications, no evidence that LigTel has ever had,
4 attempted to or ever will do business with Viaero, Sandhills
5 or New Lisbon, or that such a business relationship, if it
6 existed, has been harmed in any way. Nor is there any
7 evidence as to any other network operator.

8 And, in any event, effective July 1, 2020, no BaiCells or
9 network operator using BaiCells' equipment will broadcast PLMN
10 31198.

11 The second risk of irreparable harm they point to is it
12 makes it appear that LigTel doesn't comply with the rules, and
13 makes it appear we can't manage our network and could lead
14 other providers to treat Ligtel less favorably and may
15 frustrate LigTel's ability to serve its customers.

16 Well, there's no evidence in the record that anybody
17 anywhere has drawn this conclusion. In fact, the evidence in
18 the record is quite the opposite.

19 If you look at Mr. Wentworth's Exhibit 10 at 36-46, Viaero
20 drew the opposite conclusion and clearly was blaming BaiCells
21 for this matter. There's no evidence that any other provider
22 has treated LigTel unfavorably, nor has LigTel been frustrated
23 in its ability to serve its customers at all.

24 The third issue they raise: That it threatens LigTel's
25 reputation with customers and could interpret BaiCells'

1 actions as showing that LigTel can't control its network.

2 Well, this is refuted by the evidence.

3 Your Honor, LigTel obtained -- they purchased BaiCell's
4 SIM cards. We have submitted pictures of them in the record.
5 They tested those SIM cards. And I would direct the Court's
6 attention to 37-1 on the docket, DeGroote Exhibit C, and this
7 is an email from Mr. Mead to Mr. Wentworth at LigTel dated
8 October 30, 2019. And he says, "We purchased a BaiCells SIM
9 card from one of their suppliers and tested it on our network.
10 That test verified that BaiCells is not using our encryption
11 codes." So they have known since at least October of last
12 year that we're not using their codes.

13 All right. The fourth issue they raise: It may cause law
14 enforcement to seek information from LigTel about individuals
15 who appear to be LigTel subscribers when, in fact, they are
16 not. They have offered zero evidence that that has actually
17 happened.

18 Now, the evidence that is in the record, as far as a
19 request from law enforcement, show that what law enforcement
20 relies on when they approach a network provider is an Internet
21 protocol address.

22 As Your Honor is aware, the Internet protocol address has
23 nothing to do with the HNI code. That's the address when you
24 get on the Internet, it's the address that shows who is on the
25 Internet, the device that is connected, as it were.

1 If you look and I would direct your attention to Exhibit D
2 to DeGroote 37-1, this is an e-mail that LigTel produced, I
3 think it was from 2013, that showed that LigTel had a request,
4 they were expecting a subpoena from law enforcement, and law
5 enforcement gave LigTel an IP address number, may have been
6 more than 1; they redacted the IP address as they should have.

7 Anyway, what LigTel is trying to do is search its own
8 system, its own LTE core to identify who the individual is so
9 they could provide law enforcement the name of the person.
10 But it's all done through the Internet protocol address. And
11 that's consistent with BaiCells' experience that way and
12 there's some testimony on that, too.

13 But the final issue that they raise that I didn't hear
14 mentioned in argument is this roaming issue. Well, I think
15 that may misunderstand a bit the market that BaiCells serves.

16 It's important to understand the customer network
17 operators who use BaiCells' equipment provide fixed wireless
18 broadband Internet service to rural communities. That means
19 that there's equipment mounted to the side of the house or the
20 side of the business, and that these customers really can't
21 travel out of the coverage areas, and so there's not a lot of
22 roaming going on.

23 But let's assume there is. Let's assume roaming is an
24 issue. It is technologically not possible for somebody using
25 one of the Legacy SIM cards to roam onto another unauthorized

1 network or LigTel's network, or be identified as a LigTel
2 customer at all. And that goes back to the embedded
3 authentication keys, the K value for the subscription value,
4 the operator code or the OP value, and once those match, the
5 subscriber will not authenticate and will not be identified as
6 anything other than the customer of the network with whom they
7 have a contract. So there really is no risk of roaming.

8 So Your Honor, the record evidence does not continue any
9 showing, much less a clear showing, that LigTel is likely to
10 suffer irreparable harm if an injunction doesn't issue. And
11 for that reason alone, we request LigTel's motion be denied.

12 Now, let's talk about the merits of the underlying claims.
13 Your Honor, this just is not a Lanham Act claim. To be a
14 Lanham Act claim, LigTel has to show, number 1, that HNI code
15 311980 is a protectable mark under the Lanham Act; and, number
16 2, that BaiCells' alleged use of that mark is likely to cause
17 confusion among consumers. If they fail either, they don't
18 have a claim.

19 So let's start with protectability. LigTel does not use
20 its HNI code in commerce as defined by the Lanham Act. And,
21 of course, that definition is found at 15 U.S.C. Section 1127.
22 There are 2 ways you can show: One, if you're dealing with
23 goods, the HNI code must be placed in any manner on the goods
24 or the containers or the displays associated therewith, or on
25 the tags or labels, or if impracticable, on documents

1 associated with the goods for sale.

2 LigTel doesn't even make any argument or take any position
3 that it even sells goods consistent with this requirement,
4 since that definition really is not an issue.

5 The other definition has to do with services. And here,
6 it's clear. The HNI code must be, 1, used or displayed in the
7 sale or advertising of services; and, 2, the services are
8 rendered in commerce.

9 The record is clear and undisputed, LigTel doesn't even
10 contend that it uses or displays its HNI code in the sale or
11 advertising of services.

12 Now, what LigTel does do in its response brief -- I think
13 it's important to address this head on -- they make a
14 remarkable argument. They argue that use and commerce just
15 means use as part of its lawful business. And they cite 2
16 cases for that proposition. Neither one of those cases stands
17 for that proposition.

18 The two cases are Planetary Motion versus Techsplosion,
19 261 F.3d 1188. It's an Eleventh Circuit decision from 2001.
20 The other is Planned Parenthood versus Bucci, 1997 Westlaw
21 133313, Southern District of New York, 1997.

22 Now, Planetary Motion dealt with the issue of whether the
23 use of the mark "Coolmail" in distributing software over an
24 Internet website met the test for use of commerce.

25 Planned Parenthood had to do with the issue of the use of

1 the mark which incorporated the name Planned Parenthood
2 directed people to an anti-abortion website on an Internet web
3 page satisfied the use and commerce requirement. Both cases
4 decided that well, sure, the Internet is fine, and they were
5 decided in a period of time when the Internet was rather novel
6 and Courts were deciding these types of issues.

7 In fact, the Planned Parenthood decision, if you look at
8 note 7, expressly addresses the 1127 requirements. Now, they
9 certainly don't stand for the proposition that all you have to
10 do is show that uses part of your business somehow somewhere;
11 not what the cases say.

12 What this district has said -- in fact, this Court,
13 Northern District of Indiana, MacGregor versus Zhejiang, 328
14 F.Supp.3d 906 at 923, "The use and commerce element is,"
15 quote, unquote, "essential."

16 Your Honor, LigTel doesn't use its HNI code as a mark at
17 all. It's certainly not used in a way that would allow the
18 consuming public to associate the code with LigTel as a source
19 of the services it provides. And for that reason alone, it's
20 not a protectable mark and the Lanham Act claim fails.

21 I'd like to move to consumer confusion. And, of course,
22 what LigTel does show is that BaiCells' use of the mark is
23 likely to cause confusion among consumers, and that the
24 consumers' confusion must be confusion as to the source of
25 goods or services, okay?

1 It's only protectable to the extent its consumers can
2 distinguish one company's goods and services from those of its
3 competitors. An HNI code just doesn't serve that function in
4 any breakdown of categories of consumers.

5 Of course, LigTel's customers are at 1600 subscribers, and
6 prospective subscribers in the counties that LigTel serves.
7 LigTel doesn't argue and there's no evidence of confusion on
8 those folks. That's not the issue here.

9 BaiCells' customers are network operators, the people who
10 buy BaiCells' equipment. And there's no confusion among
11 network operators of the source of BaiCells' products and
12 services.

13 The only confusion here was the source of an interfering
14 radio signal, which is not a BaiCells' product or service. It
15 just isn't the sort of consumer confusion that's actionable
16 under the Lanham Act. And so for these reasons, two of the
17 Lanham Act claims fail and don't support the issuance of a
18 preliminary injunction.

19 Finally, trade secrets. The genesis of the trade secret
20 claim is Randy Mead's allegation that Bo Wei, who is a former
21 President of BaiCells -- and I'm going to quote this exactly
22 from Mr. Mead's statement, which can be found on the record at
23 36-23, paragraph 22, Bo Wei "...offered to have [Ronald] Mao
24 get into our Huawei-manufactured core and reprogram it
25 himself, so Mao could do it for free and we would not have to

1 pay Huawei to do so."

2 All right. Now, Mr. Wei categorically denies making the
3 statement. But let's just assume it's true. Wei doesn't
4 allege anywhere that Wei stated that Mao could get into the
5 core and reprogram it himself without obtaining any
6 information from LigTel; doesn't say that.

7 Wei doesn't allege that Wei stated that Mao would do so
8 without LigTel's permission. In fact, to the contrary. Wei
9 characterizes the statement as an offer. He offered to do
10 this. Well, it implies that unless there's acceptance, it's
11 not going to happen. So that's Wei.

12 Now, LigTel then tries to pin its trade secret conspiracy
13 theory on Ronald Mao, who, Your Honor, is listening in on
14 these proceedings today.

15 LigTel installed its Huawei LTE core in 2012. Mr. Mao had
16 no involvement with LigTel until the 2015/2016 time period
17 when he was assigned by Huawei in a sales support role.

18 To be clear, Mr. Mao was not involved in the design,
19 configuration, sales or installation of any equipment that
20 LigTel has purchased from Huawei. Mr. Mao never visited
21 LigTel's facilities, never saw its equipment.

22 Now, the only document that LigTel submitted in support of
23 its allegation that Mr. Mao had access to trade secret
24 information is Exhibit 8 -- pardon me, Your Honor -- Mr.
25 Wentworth's April 3rd declaration. This document, Your Honor,

1 contains about 16 pages of redacted information.

2 So what we're left to rely on is two things: Mr.
3 Wentworth's characterization of the document, and at 36-36 on
4 the docket, paragraph 18, Mr. Wentworth characterizes it as
5 "Containing locations of towers, development of LTE work and
6 other proprietary information, all of which is a component of
7 the network architecture."

8 Now, Mr. Wentworth does not allege, nor if you look at the
9 document to the unredacted headers on its state (phonetic),
10 that the document contained LigTel's encryption code. There's
11 no evidence that that document contained the encryption code.

12 Now, what's interesting, though, is that much of the
13 information about LigTel's network architecture is publicly
14 available on the Federal Communication Commission's website.
15 If you go on there, Your Honor, and plug in LigTel, you can
16 find the precise identity and location of each one of its
17 towers by town, latitude and longitude.

18 You could find the manufacturer and make of the equipment
19 that's mounted to those towers. I can go on forever. I would
20 direct the Court to Mao's declaration, which is on the docket
21 at 35-4, paragraph 22.

22 So, in any event, there's no evidence that Mr. Mao even
23 looked at the attachment, much less memorized all 16 pages or
24 took it with him.

25 The evidence is that when Mr. Mao's employment was

1 terminated June of 2017 at Huawei, Mr. Mao left his laptop
2 computer and all work-related documents with Huawei. And
3 since he left Huawei, June of 2017, he's not had possession of
4 or access to any documents or information LigTel alleges to be
5 confidential or trade secrets, aside from what he might
6 remember or have access to on the FCC website.

7 Mr. Mao's testified he doesn't even have the ability to
8 get into LigTel's core and reprogram it, much less the desire
9 or inclination or any reason to do so.

10 Final point, Mr. Mao had nothing to do with BaiCells'
11 adoption of PLMN 31198 over in China in 2015. That started in
12 research and development over 2 years before Mr. Mao became
13 employed at BaiCells.

14 And then I keep coming back to this, because I think it's
15 important and dispositive. LigTel's own documents, their own
16 evidence, again, found at 37-1, Exhibit C, shows that they
17 tested the SIM cards and concluded October 2019 BaiCells is
18 not using their encryption code.

19 I would add, Your Honor, that BaiCells did an exhaustive
20 search for documents to respond to the discovery. We
21 produced, I think, in excess of 60,000 pages of documents.
22 None of them contains or constitutes a trade secret. There's
23 simply no evidence of misappropriation of trade secrets. And
24 for this reason, too, the motion should be denied.

25 Finally, Your Honor, I want to reiterate, if an injunction

1 is issued and finalization of BaiCells' Migration Plan is
2 halted, then literally tens of thousands of Americans will
3 immediately lose access to the Internet at the worst possible
4 time.

5 If an injunction is not issued, and we respectfully submit
6 there's no basis for issuing one, then BaiCells will complete
7 its Migration Plan on July 1, 2020. At that time, there's no
8 network provider anywhere that will broadcast the code 31198,
9 and the risk of any harm to LigTel, irreparable or otherwise,
10 between now and then is nil.

11 And so for these reasons, Your Honor, BaiCells
12 respectfully requests the Court deny LigTel's motion for a
13 preliminary injunction. Thank you.

14 **THE COURT:** Thank you, Mr. Arceneaux.

15 Mr. Gillett, any brief rebuttal?

16 **ATTORNEY GABRIEL GILLETT:** Yes, Your Honor. Thank
17 you for the opportunity.

18 I'll keep my remarks brief, but I think there are a few
19 things that jump out at me that are very important that the
20 Court understands that make a distinction.

21 The first one, I'll pick up where Mr. Arceneaux left off.
22 He says that the risk of harm to issuing an injunction only
23 occurs if the BaiCells Migration Plan is stopped. That's not
24 what we are trying to do. We are not suggesting that the
25 Court cut off anyone from the Internet. We are not suggesting

1 in the context of the world that we find ourselves in that the
2 Court say BaiCells, you need to shut down your equipment
3 immediately.

4 What we are saying is that BaiCells should be ordered to
5 complete its migration and complete it very quickly. If
6 BaiCells is ordered to complete the migration and complete it
7 quickly, then that resolves our harm for a few reasons.

8 First, there will no longer be signals out there that look
9 like they're coming from LigTel when they're actually coming
10 from BaiCells.

11 Second, no operator will be confused about the source of
12 the signal, and the evidence shows that they have been
13 confused so far.

14 And also, I think it's very important that what Mr.
15 Arceneaux did not tell you is that there's any real difficulty
16 in BaiCells completing this migration now. The software is
17 written, it's been implemented, it's been rolled out.

18 Now, he said there is no doubt that, you know, on July
19 1st, anyone who doesn't upgrade the software will be cut off.
20 I'd point the Court to BaiCells' response brief at page 5, and
21 the Harnish supplemental declaration, paragraph 5, which does
22 not say that.

23 What BaiCells says is that anyone who hasn't upgraded by
24 July will "risk going off line." Now, I think that's really
25 important, because of the history and context of this case.

1 And that is that BaiCells has been using our code, has no
2 explanation for doing so, and really no excuse for doing so,
3 and they've been doing it with impunity. They've did for
4 years. They've did it even after we sued. They kept it on
5 their website until this Court intervened.

6 And I thought it was interesting that the frame that is
7 offered in the declarations and in Mr. Arceneaux's
8 presentation to say BaiCells took LigTel's code off of its
9 website on, I think the date they gave is February 19th.
10 Well, that wasn't a voluntary decision. That was because the
11 Court said to BaiCells at a hearing why in the world is their
12 code on your website and they had no reason for it to be
13 there. And I think that's emblematic of why we think an
14 injunction is so important here, a preliminary injunction.

15 It's not the end of the day. It's not a final decision.
16 But we think it's important, because there is nothing binding
17 and enforceable about that ATIS migration process.

18 So although BaiCells says they'll finish everything by
19 July, there's no reason they need to, and there's no reason
20 that if on July 1st, they say, you know what, we don't want to
21 have -- to force the remaining, say, 20 percent of providers
22 out there who still haven't upgraded to do that. Based on the
23 declaration BaiCells has offered, maybe those people will not
24 be cut off, and we think that an injunction issued by the
25 Court will not only ensure that that upgrade happens, but it

1 also can be tailored to avoid any risk of harm to non-parties.

2 And so I think it's important for the Court to not be
3 confused that there is not a risk that issuing an injunction
4 will cut anyone off from the Internet. The injunction will
5 say BaiCells needs to do the migration and do it now, and that
6 migration prevents people from getting kicked off the
7 Internet. I think the other thing --

8 **THE COURT:** When did LigTel become aware of the
9 BaiCells Mitigation Plan? I know they said they submitted it
10 back in September of 2019. When exactly did LigTel become
11 aware of that Mitigation Plan?

12 **ATTORNEY GABRIEL GILLETT:** I believe at the same
13 time, Your Honor. The Mitigation Plan was submitted as part
14 of the ATIS process that we started, because we went to ATIS
15 and said BaiCells is using our code, make them stop, and
16 that's -- there was some delay in actually getting the
17 Migration Plan from BaiCells, but we were a part of that
18 process.

19 **THE COURT:** Okay. So BaiCells -- I'm sorry -- LigTel
20 has known of the July 1 date since September?

21 **ATTORNEY GABRIEL GILLETT:** Actually, that I don't
22 think so. We've known of the Migration Plan. I don't believe
23 that the July 1st date was part of the process. Back then, I
24 apologize, I do not know when July 1st came into the mix. But
25 BaiCells has said July 1st to its customers as of, I think,

1 March 18th. You know, I think 9 months after we alerted them
2 to this issue.

3 So I think that, to me, is another example of the need for
4 an injunction, because nothing about what BaiCells has done at
5 any stage in its activity related to LigTel's code suggests
6 that BaiCells will just do this because they think it's
7 important. At every step, they continue to say things like
8 the code is 31198, so therefore, it's different than 311980.

9 The undisputed evidence is that's not true. ATIS says
10 it's not true. The administrator says it's not true.
11 BaiCells own communications to each other say it's not true.

12 I think Mr. Arceneaux pointed to Exhibit 10 to the
13 Wentworth declaration. It's this message with Jeff Brown.
14 And Mr. Arceneaux noted that there's a screen shot that says
15 31198, and there's a link to the website that refers to 31198.
16 What Mr. Arceneaux didn't mention for the Court is that the
17 e-mail on top of those 2 is a quote from the Jeff Brown
18 writing, and he says, "Sandhills Wireless is using your
19 MCCMNC" -- which is another way to say HNI code. "BaiCells
20 should not be telling clients to use your information.
21 Sandhills should be shut down until they have their own
22 MCCMNC."

23 I think that's an example of the confusion that's being
24 caused. And BaiCells reads that to say well, there wasn't any
25 actual harm, because LigTel intervened and fixed the problem.

1 But, Your Honor, I think that gets the standard for a
2 preliminary injunction backward. It's not that we are
3 obligated to avoid harm to ourselves by going out and
4 disabusing providers of the notion that the signal that looks
5 like it's coming from us is not coming from us. It's the
6 other way around.

7 We've shown, based on that actual confusion, that there's
8 a likelihood of harm if that confusion continued, because it
9 was only by virtue of us talking to Viaero that we protected
10 our goodwill and reputation. And I think it's a little bit
11 frustrating to hear BaiCells talk about how, you know, we
12 aren't being harmed because we fixed the problem. But the
13 reality is they're doing this all over the country. And so we
14 have no way of knowing which providers out there see a signal
15 that looks like it's coming from us and don't realize that it
16 is not.

17 I think the other thing that's important to address is the
18 likelihood of success issues. And Mr. Arceneaux ticked
19 through them. You know, I think our brief pretty clearly
20 addresses the customer issue, and I think you might have
21 noticed that, even in describing how the Lanham Act works,
22 what BaiCells is trying to do is switch the frame from
23 BaiCells' customers to the end user customers, which he
24 (phonetic) did admit are not BaiCells customers.

25 The relevant market here, which the Seventh Circuit

1 directs you to look at, the relevant market is Internet
2 service providers. It's their confusion that's cognizable
3 under the Lanham Act. It's their consideration of the meaning
4 of an HNI code. It's not end users. And I think that plays
5 into BaiCells' point about whether the market is protectable.

6 They say that use and commerce isn't shown because end
7 user customers don't use the HNI code. But I think as I've
8 explained, and as our briefs lay out pretty clearly, what
9 matters for purposes of use and commerce is whether it is used
10 in commerce. It's what the phrase means and the Courts have
11 interpreted that to mean that the Lanham Act, protectable
12 marks under the Lanham Act include everything that is
13 considered interstate commerce within the Constitution, and I
14 don't think there's any dispute what we are doing and what
15 BaiCells is doing qualifies as that.

16 The other point, the other aspect of protectable marks is
17 whether the mark is identifiable, whether it identifies the
18 holder of the mark. And I think BaiCells' argument is end
19 users don't identify the HNI code with LigTel. That might be
20 true, but it's not relevant here, because the evidence shows
21 that Internet service providers do associate LigTel with the
22 HNI code.

23 In fact, that's why Jeff Brown contacted us. And that's
24 why Sandhills agreed to enter into a license to use our code,
25 and that's ATIS assigned the code to us. It's precisely

1 because we're identified with that code. And so anything that
2 deals with that code improperly, whether it's through a signal
3 or through communications that use the code, has a risk of
4 harming our goodwill and reputation, because it suggests that
5 we're involved with it and we're not.

6 I think that brings me to another aspect of Mr.
7 Arceneaux's presentation, which was about SIM card. And I
8 think it's really important that the Court understand how the
9 SIM cards work here. The SIM cards do not have anything to do
10 with the signal. The SIM cards are, as he said, they are
11 affixed -- they're physical chips. They're part of the
12 equipment.

13 Now, I direct the Court to Wentworth declaration, which is
14 document 37 on the docket -- or excuse me, 36. Document 36-47
15 is pictures of these SIM cards. And what you'll notice is
16 that they all say on them 311980, LigTel's HNI code. And the
17 reason that matters is not because a customer is going to open
18 up its device and look at a chip; we don't think they will.

19 But it matters because Internet service providers do
20 exactly that. When someone -- when an Internet service
21 provider looks at a SIM card that starts 31198 or 311980, they
22 presume that this is a LigTel card, when it's not. Law
23 enforcement does the same thing.

24 And I think Mr. Arceneaux highlighted the exhibit attached
25 to Ms. DeGroote's declaration that talked about IP address.

1 And it is true those documents talk about IP address. The
2 thing that those documents also say, at least they make clear,
3 is that LigTel uses the IMSI number, which includes the HNI
4 code to associate customers with IP addresses. And I've
5 spoken with Mr. Wentworth. I spoke with him yesterday, and he
6 is prepared -- we have a declaration prepared that we will
7 offer, Your Honor, if we can submit it, where he lays this out
8 a little bit more clearly.

9 But what he explains is that in that message, when law
10 enforcement comes to him with an IP address, the IP address is
11 temporary. It is not tied to a particular consumer for all
12 time. It's tied to a particular consumer at a particular date
13 in time.

14 And so when he gets a subpoena for IP address information,
15 he goes back to Huawei, as you see in those messages, and he
16 tries to figure out what is the IMSI number attached to the IP
17 address at that point. The IMSI number has the HNI code in
18 it. So it is critical that the HNI code be accurate and
19 actually be a LigTel subscriber, otherwise law enforcement
20 will be confused.

21 And there's a second aspect of the SIM card in law
22 enforcement that Mr. Wentworth has explained, and that is, it
23 has to be a physical seizure of devices. So if law
24 enforcement does an investigation that starts online, they go
25 by IP address.

1 When they execute a physical search warrant of the
2 physical address that corresponds to the IP address, they
3 seize all of the devices on the premises, and they open up
4 those devices and look at the SIM cards to figure out who is
5 the provider of service to that device. When they open up the
6 device, and they see a SIM card that says 311980, guess who
7 they come to? It's LigTel. It's not someone else. It's not
8 Sandhills or Viaero, because they don't have that HNI code.

9 And so I think it's important to recognize that the SIM
10 card issue is a real one, even independent of the signal
11 problem.

12 I think that that -- you know, I think what I'll -- just
13 one final point for Your Honor, and that is to really
14 reinforce the irreparable harm here. Because I think the
15 facts are undisputed to show that our code is being used and
16 used improperly. I think that improper use shows that we're
17 likely to succeed on the merits of our Lanham Act claims based
18 on that improper use.

19 I think we're suffering harm, and the harm is irreparable,
20 not because of -- because it's a Lanham Act claim. It has
21 nothing to do with eBay and Flava Works. The harm we're
22 suffering is irreparable because it can't be quantified into
23 damages, because it is harm to our goodwill and reputation.

24 And Mr. Arceneaux said, you know, the issue is we're not
25 allowed to rely on a presumption of harm, we have to show the

1 harm. We've done that. That's what the evidence shows.
2 That's in the Wentworth and Mead declarations. That's the
3 statements from Jeff Brown from Viaero. That is the
4 undisputed use of our code in a way that makes it look like
5 it's our signal and it's not. We've shown that evidence. The
6 only presumption we're relying on is, once we've shown harm to
7 our goodwill and reputation, that harm is irreparable as
8 opposed to compensable by damages. And I don't hear Mr.
9 Arceneaux to say otherwise. I don't read eBay and Flava Works
10 to say otherwise. They're talking about a different issue,
11 which is whether you have to show harm at all.

12 And I think the last point we've gone through the elements
13 is just to reinforce where I started with this rebuttal of
14 ours, and that is that the Court can issue an injunction that
15 has real important value to us. It would not cut anyone off
16 from the Internet, because all the injunction need do is make
17 BaiCells complete the Migration Plan now, as opposed to
18 waiting until July, in the meantime when we are still at a
19 risk of harm, and no one would be cut off from the Internet.

20 As Mr. Arceneaux said, when the upgrade happens, there is
21 a "momentary network interruption." It is not as though the
22 upgrade kicks any user off of the Internet. It doesn't
23 require the user to do anything. It is a software upgrade
24 that happens at the Internet service provider level. It's
25 already happened for some providers, and it can happen again

1 very quickly, which would fix our harm and only be a minimal
2 burden on BaiCells that it's brought upon themselves.

3 Thank you, Your Honor.

4 **THE COURT:** Thank you, Mr. Gillett.

5 Mr. Gillett, Mr. Arceneaux and all counsel, I would like
6 to thank you for the thorough briefing and today's arguments.

7 What I would like to do, the Court at this point is going
8 to take the motion under advisement. However, we will do our
9 best to issue a decision on the motion promptly. But again, I
10 thank you for your participation today, and we'll get an order
11 out as soon as we can. Thank you.

12 **ATTORNEY ADAM ARCENEUX:** Thank you, Your Honor.

13 **ATTORNEY GABRIEL GILLETT:** Thank you, Your Honor.

14 * * *

15
16 **CERTIFICATE OF THE REPORTER**

17 I hereby certify that the foregoing proceedings is true
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